APPEAL NO. 010817
FILED JUNE 6, 2001

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held beginning February 13, 2001, and concluding March 28, 2001. The hearing officer resolved the disputed issues by determining that the issue of the respondent's (claimant) impairment rating (IR) be returned to the dispute resolution officer to ensure that the claimant be reexamined by the designated doctor so that his IR from the compensable occupational diseases could be assessed. The hearing officer further held that the claimant timely disputed the report of the designated doctor and that the Texas Workers' Compensation Commission (Commission) did not abuse its discretion in sending additional medical information back to the designated doctor.

The appellant (carrier) appeals and requests that the Appeals Panel reverse the hearing officer's decision based on the legal insufficiency of the evidence and on the improper application of the law. In effect, the carrier argues that the designated doctor's report had become final and neither the claimant nor the Commission could reopen inquiry as to maximum medical improvement (MMI) and IR. The finding of disability has not been disputed. There is no response from the claimant in the file.

DECISION

Affirmed based upon the record, indicating that the first report of the designated doctor was not entitled to presumptive weight because the great weight of contrary medical evidence indicated that the claimant was not at MMI.

This is a case in which the claimant's undisputed hand injury of _____, ultimately resulted in surgery and lost time from work which forms the basis of the reason for a dispute over MMI and IR. To greatly summarize the relevant facts, the claimant was initially evaluated by a doctor for the carrier, Dr. K, who examined the claimant on August 26, 1999, and determined that further testing was necessary. He filed a supplemental report on October 6, 1999, after an MRI. He noted no abnormalities on the MRI. Dr. K went on to state that the claimant's wrist pain was likely due to partial injury to ligaments of his right wrist "with a sprain type injury that would be expected to resolve over the next several months." He nevertheless went ahead and determined that he would place the claimant in an MMI status and assess an IR "with the assumption that the above will occur." No further examination was done at this time, but Dr. K assigned a zero percent IR. He put the claimant on restrictions for six weeks and anticipated that he could work full duty after that time. The claimant's treating doctor initially checked boxes indicating disagreement but then changed his response to agree.

Dr. K's report was disputed and a designated doctor, Dr. C, examined the claimant on November 15, 1999. Dr. C noted that the claimant had been diagnosed with De Quervain's tenosynovitis. She also noted that a neurologist whom the claimant had seen

performed an EMG that was reportedly indicative of right carpal tunnel syndrome (CTS) but that she did not have the report to review. Phalen's testing was normal. Dr. C noted that she would have ordinarily rated a six percent IR but she disallowed it due to lack of maximal effort and no objective findings on the MRI. She stated that she "agreed with" Dr. K's October 6, 1999, date of MMI.

The claimant testified that around this time he was able to continue working and did so, but he had increasing problems in his right wrist which became severe. He changed his treating doctor to Dr. W in April 2000 and was determined by Dr. W to require surgery after months of conservative therapy failed to relieve the problem. A CTS release and injection for right De Quervain's tenosynovitis was performed August 31, 2000. Dr. W wrote a letter on September 18, 2000, that said that the claimant had not reached MMI. Although the claimant said he went back to work for three weeks after his surgery out of financial need, he was not working at the time of the CCH.

The claimant asked for a benefit review conference on September 13, 2000, to reevaluate Dr. C's IR. Dr. C was contacted by the benefit review officer (BRO) on October 30, 2000, asking Dr. C if she still felt that the claimant was at MMI and whether she wished to reevaluate him. Dr. C's response stated that she has reviewed claimant's records and that the surgery would impact MMI and IR. Dr. C did not examine the claimant at this time but recommended that he be reevaluated at four to six months after his surgery. Dr. C filed another Report of Medical Evaluation (TWCC-69), cast as an "amended" TWCC-69, that stated that the claimant had not reached MMI.

The parties stipulated that MMI by operation of law occurred on March 10, 2001. The hearing officer's discussion and findings of fact are essentially accurate, but she was wrong in her finding that De Quervain's syndrome and CTS had not been diagnosed at the time of the designated doctor's examination. Both diagnoses are clearly referenced in Dr. C's narrative report. Although the hearing officer has recited the Appeals Panels decisions at length concerning "proper purpose" amendments, it would be more accurate to characterize Dr. C's subsequent TWCC-69 as a revocation of the previous report on MMI. Had an examination occurred and a new TWCC-69 been done assessing impairment, the "proper purpose" amendment line of cases would be more applicable.

Dispute of the designated doctor's report and abuse of discretion by the Commission. The hearing officer did not err in determining that the claimant could dispute the designated doctor's first report. Whether one has acted with reasonable diligence to revisit the conclusions of a designated doctor depends upon the facts of the case. Whether a designated doctor's amended report has occurred for a proper purpose and within a reasonable amount of time is essentially a question of fact. Texas Workers' Compensation Commission Appeal No. 000601, decided May 9, 2000, (citing Texas Workers' Compensation Commission Appeal No. 960888, decided June 18, 1996).

As the hearing officer has pointed out in her discussion, somewhat great latitude in analyzing this is employed when 104 weeks have not passed from the date income

benefits accrued. Texas Workers' Compensation Commission Appeal No. 990833, decided June 7, 1999 (where the claimant has surgery after the designated doctor certifies an IR, the Appeals Panel considers whether the designated doctor's MMI and IR certification took place before or after the date of statutory MMI). Unlike Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § Rule 130.5(e) (Rule 130.5(e)) covering finalization of the first IR assigned to a claimant, there is no time frame established in the Commission rules for questioning the conclusions reached by a designated doctor.

Abuse of discretion by the Commission in contacting the designated doctor. The hearing officer did not err in determining that the Commission did not abuse its discretion in contacting the designated doctor with new medical information about the claimant's surgeries. An issue questioning the achievement of MMI by the claimant and his IR, based upon new surgery, was squarely before the Commission. We cannot agree that a designated doctor, who operates as a designee of the Commission, is precluded from offering his or her opinion at any point beyond seven days after an examination. The facts here do not fall within Rodriguez v. Service Lloyds Ins. Co., 997 S.W.2d 248 (Tex 1999).

While we would agree that the BRO's letter would have been better if it informed Dr. C that a reexamination would be required in the event of a change, Dr. C did not recertify MMI (which does require an examination under Rule 130.1) but stated that the claimant is not at MMI. Dr. C agreed in any case that the claimant would require a reevaluation in four to six months. The time for holding the CCH occurred before this happened, so the hearing officer was faced with having to determine the issues where there was incomplete resolution of the recontact with the designated doctor.

Determination of the MMI issue. We hold that the hearing officer did not err in her legal conclusion that the claimant had reached MMI by operation of law on March 10, 2001. In this case, the hearing officer was faced with analyzing whether the first report of the designated doctor could be accorded presumptive weight. Although the better practice would have been to expressly perform a "great weight" analysis on Dr. C's original report, by not giving presumptive weight to this first report the hearing officer in essence has made the implied finding that the great weight of contrary medical evidence was against that first report as to MMI. We agree.

We would first point out that Dr. C stated that she did not have the original EMG report, which takes on importance in her IR as she ultimately discounted a six percent IR based in part on the normal MRI and lack of other objective tests. We note too that Dr. C incorporated Dr. K's MMI date; however, a fair reading of Dr. K's narrative report to the TWCC-69 he filed indicates that he believed that the claimant would continue to improve and that he assessed MMI based in part on this. He examined the claimant only once, two months before the date he certified MMI. Medical records from Dr. W indicated that the claimant's condition continued to worsen and that he failed to respond to conservative therapy to the point where he had the inability to work and required surgery, all of which occurred prior to statutory MMI. There were no reports which indicated that the claimant

was certified at MMI on any date other than October 6, 1999. The hearing officer recited the medical evidence against the achievement of MMI by that date.

When the great weight of contrary medical evidence is against the designated doctor's report on MMI, then the hearing officer may find MMI consistent with the date found in another report, or that the claimant is not at MMI, or that the claimant has reached MMI consistent with the definition set out in Section 401.011(30)(B). Because the hearing officer concluded that the claimant reached "statutory" MMI, by operation of law, she need not have given "presumptive weight" to Dr. C's November 2000 TWCC-69 that stated that the claimant was not at MMI. Resolution of the IR will be deferred pending a second examination by the designated doctor. We will uphold the hearing officer's judgment if it can be sustained on any reasonable basis supported by the evidence. Daylin, Inc. v. Juarez, 766 S.W.2d 347, 352 (Tex. App.-El Paso 1989, writ denied); Texas Workers' Compensation Commission Appeal No. 950791, decided July 3, 1995. We likewise affirm the related issue of duration of disability.

Pursuant to Section 410.165(a), the hearing officer is the sole judge of the weight and credibility of the evidence. The hearing officer resolves the conflicts and inconsistencies in the evidence and determines what facts have been established from the conflicting evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ); St. Paul Fire & Marine Insurance Company v. Escalera, 385 S.W.2d 477 (Tex. Civ. App.-San Antonio 1964, writ ref'd n.r.e.). This is equally true regarding medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ). This tribunal will not disturb the challenged findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not agree that this is the case here, and affirm the decision and order.

For these reasons, we affirm the decision and order of the hearing officer.

Susan M. Kelley
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

CONCURRING OPINION:

There is ample evidence, including the claimant's surgeries for his compensable injury that occurred after the designated doctor's evaluation and before statutory maximum medical improvement (MMI), to support the hearing officer's determination that the claimant did not reach MMI until the statutory date of MMI determined under section 401.011(30)(B).

Robert W. Potts
Appeals Judge